86-1275

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JACK L. DICKIE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 1, 1986

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28 pp

QUESTIONS PRESENTED

I. MAY A DISTRICT COURT PENALIZE A DEFENDANT FOR STANDING TRIAL BY IMPOSING A SENTENCE SEVEN TIMES AS SEVERE AS IMPOSED UPON A CODEFENDANT WHO PLED GUILTY WITHOUT EXPLAINING THE DISPARITY ON THE RECORD WHICH COULD CONCEIVABLY GIVE RISE TO AN APPEARANCE OF VINDICTIVE SENTENCING?

II. MAY A DISTRICT COURT IMPOSE CONSECUTIVE SENTENCES WITHOUT FINDING THAT A DEFENDANT POSES A DANGER TO THE COMMUNITY?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

JACK L. DICKIE,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK L. DICKIE respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is reproduced in the Appendix ("App.") at pages 1a-8a.

The opinion of the United States District Court for the Western District of Texas dated March 10, 1986, is reproduced in the Appendix (App. 7a-9a). The opinion is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1984 (App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner Jack L. Dickie was alleged to have devised a scheme with codefendants Mike Hernandez, Jr., and Roberto Garcia in 1979 to defraud Larry Burnett and Brandt Starrett out of $200,000 by offering to "launder" money for them and then arrange for their arrest in Mexico in possession of illegally imported firearms and explosives. Burnett and Starrett were never arrested in Mexico, nor did they testify at petitioner's trial. All information in regards to the alleged money laundering scheme was hearsay.

In 1984, petitioner was indicted in the United States District Court for the Western District of Texas on five counts of wire fraud in violation of 18 U.S.C. § 1343 (counts 1-5), one count of conspiracy to export defense articles illegally in violation of 18 U.S.C. §§ 371, 924(b), 22 U.S.C.

§ 2278 (count 6), one count of illegally exporting defense articles without a license in violation of 22 U.S.C. § 2278 (count 7), one count of unlawful export of firearms with intent to commit a felony in violation of 18 U.S.C. § 924(b) (count 8), and one count of illegal possession of a firearm that did not have serial numbers in violation of 26 U.S.C. § 5861(i) (count 9). Codefendant Hernandez was charged with violating counts 1 through 7, and Garcia died prior to the indictment.

Petitioner and codefendant Hernandez were joined for trial. Count 9 of the indictment was dismissed prior to trial. The trial ended in a hung jury, and a mistrial was declared.

Prior to the second trial, codefendant Hernandez was severed from petitioner. Hernandez did not testify for the government. Count 8 of the indictment was dismissed prior to the second trial.

On January 11, 1985, a jury found petitioner guilty on all seven counts of the indictment. On March 1, 1985, petitioner was sentenced to five years imprisonment on each of the wire fraud counts, four of the counts were to be served consecutive to each other, with concurrent terms of five years on the conspiracy charge and two years on the exportation charge, for a total of twenty years imprisonment. Petitioner was also assessed fines totaling $115,000.00.

Petitioner appealed the conviction to the United States Court of Appeals for the Fifth Circuit. On October 25, 1985, the court of appeals affirmed. *United States v. Dickie,* 775 F.2d 607 (5th Cir. 1985).

Petitioner filed a timely motion pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure to the

district court requesting a reduction of sentences as well as the fines. The Rule 35 motion raised a number of issues which included the imposition of consecutive sentences by the district court without finding that the defendant posed a danger to the community, and a due process violation in that petitioner was penalized for exercising his right to stand trial when the court imposed a sentence seven times as severe on petitioner as it imposed upon codefendant Hernandez without explaining the disparity on the record. Hernandez was an attorney in the Western District of Texas who was involved in politics.

On March 10, 1986, the district court denied petitioner's Rule 35 motion but only addressed the issues of the due process violation at the time of sentencing, and the sentencing on the basis of false premises. App. 7a-9a. Petitioner appealed the denial of the motion as an abuse of discretion to the Fifth Circuit. In an opinion issued October 8, 1986, the court of appeals affirmed the district court's denial of reduction of sentences and fines. But, the decision of the Fifth Circuit Court of Appeals is in conflict with the Eighth Circuit[1] on the issue of dangerousness when imposing consecutive sentences, and in conflict with the Ninth Circuit[2] and the First Circuit[3] on the issue of penalizing a defendant for standing trial without explaining the disparity of sentences on the record.

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1. *United States v. Hardrich*, 707 F.2d 992, 993 n. 1 (8th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983).

2. *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976) (per curiam); *United States v. Stockwell*, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

3. *Longval v. Meachum*, 693 F.2d 236 (1st Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983); *United States v. Crocker*, 788 F.2d 802, 809 (1st Cir. 1986).

REASONS FOR GRANTING THE WRIT

THERE IS A SPLIT IN THE CIRCUITS ON IMPORTANT QUESTIONS OF FEDERAL LAW.

I. MAY A DISTRICT COURT PENALIZE A DEFENDANT FOR STANDING TRIAL BY IMPOSING A SENTENCE SEVEN TIMES AS SEVERE AS IMPOSED UPON A CODEFENDANT WHO PLED GUILTY WITHOUT EXPLAINING THE DISPARITY ON THE RECORD WHICH COULD CONCEIVABLY GIVE RISE TO AN APPEARANCE OF VINDICTIVE SENTENCING?

Petitioner and codefendant Hernandez were tried together at the first trial. Petitioner was charged with violating nine counts of the indictment and Hernandez was charged with violating the first seven counts of the indictment. Count 9 of the indictment was dismissed prior to trial. The trial ended in a hung jury, and a mistrial was declared. *United States v. Dickie,* 775 F.2d 607, 609 (5th Cir. 1985).

Petitioner was tried a second time and found guilty of violating the first seven counts of the indictment. Count 8 of the indictment was dismissed prior to the second trial. Codefendant Hernandez was severed for the second trial.

After petitioner was found guilty, codefendant Hernandez entered into a plea agreement with the government wherein he would enter a plea of guilty to a four count misdemeanor information. App. 5a, n. 2.

At the first trial, Hernandez was charged with violating the first seven counts of the indictment which

counts petitioner was ultimately convicted. After the first trial, Hernandez entered into a plea agreement with the government wherein he would plea guilty to a four count misdemeanor information. Petitioner was never given the opportunity to enter a plea to a misdemeanor information. Hernandez was a local attorney in the Western District of Texas of some prominence, and he was involved in local politics. Hernandez was sentenced to a term of three years imprisonment. The evidence at the first trial showed Hernandez to be more culpable than petitioner.

At the time petitioner was sentenced, Chief Judge Sessions sentenced him to five years imprisonment on the five counts of wire fraud (involving one alleged scheme to defraud), with four of the five counts to be served consecutive to each other, for a total sentence of 20 years. Judge Sessions did not state on the record why he was sentencing petitioner to a sentence seven times as severe as the sentence the court imposed upon codefendant Hernandez.

Petitioner was 59 years of age at the time of sentencing, and his only previous conviction was in 1953 in the State of Colorado for grand larceny, but he later received a Governor's Pardon in regards to this conviction. The present sentence is tantamount to a life sentence for petitioner.

In Judge Sessions order of March 10, 1986, in reference to petitioner's due process argument, the court stated "in the instant cause, Defendant Hernandez was **never** tried on the original indictment in Cause No. SA-84-CR-106, but rather pled guilty to a superseding information charging a violation of three (sic) misdemeanors." App. 8a. This is patently false. Codefendant Hernandez stood trial along with petitioner in Judge Sessions court at the first

trial wherein a mistrial was declared due to a hung jury. The jury was divided for conviction. Hernandez was severed for the second trial. The court's facts are faulty.

The court of appeals rejected petitioner's due process argument and stated "Dickie . . . also argues that the district court denied him due process of law by improperly penalizing him with a heavier sentence for exercising his constitutional right to stand trial. We also find this contention to be without merit." App. 5a. This point is in direct conflict with the First and Ninth Circuits.

The Ninth Circuit has held where there is substantial disparity in sentences imposed upon different defendants for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation in the record. *United States v. Capriola,* 537 F.2d 319, 321 (9th Cir. 1976) (per curiam). This was not done in petitioner's case, and it is in direct conflict with what the Fifth Circuit ruled in petitioner's case. Petitioner was penalized because he exercised his right to stand trial, and his constitutional rights have been infringed. *United States v. Stockwell,* 472 F.2d 1186 (9th Cir.), *cert. denied,* 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973). The record reflects that the sentences imposed upon petitioner are seven times as severe as the sentences imposed upon codefendant Hernandez who entered into a plea agreement after petitioner was convicted at the second trial.

The First Circuit stated "[d]efendant complains of the disparity between the three-year sentence in the house of correction given to his co-defendant who pleaded guilty and the lengthy prison sentence given him . . . [T]he trial court voiced no explanation, in contrast to the practice often found appropriate because of the circumstances.

See e.g., North Carolina v. Pearce, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969) (*quoted in United States v. Goodwin,* [457 U.S. 368], 102 S.Ct. [2485] at 2489, [73 L.Ed.2d 74 (1982)]; *United States v. Miller,* 589 F.2d 1117, 1137-39 (1st Cir. 1978), *cert. denied,* 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979); *United States v. Capriola,* 537 F.2d 319, 320-21 (9th Cir. 1976) (per curiam)." *Longval v. Meachum,* 693 F.2d 236, 238 (1st Cir. 1982), *cert. denied,* 460 U.S. 1098 (1983).

The record is abundantly clear that the district court punished petitioner because he stood trial and did not enter into a plea bargain with the government. This Court has clearly stated "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ." *Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). It is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial. *United States v. Medina-Cervantes,* 690 F.2d 715, 716 (9th Cir. 1972) (citations omitted). But, this is exactly what transpired in petitioner's case. The record clearly indicates that the district court abused its discretion when it sentenced petitioner to 20 years confinement and petitioner's codefendant to three years imprisonment without explaining the disparity of the sentences on the record.

Where infringement of a defendant's constitutional rights is implicated, appellate courts have, indeed, exercised supervisory authority in the administration of justice to review even a sentence within statutory limits. *See Townsend v. Burke,* 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (denial of due process); *United States v. Stockwell,* 472 F.2d 1186, 1187 (9th Cir.), *cert. denied,* 411 U.S.

948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973) (constitutional right to stand trial); *Gebhard v. United States,* 422 F.2d 281, 284 (9th Cir. 1970) (cruel and unusual punishment); *United States v. Wiley,* 278 F.2d 500 (7th Cir. 1960) (supervisory authority exercised to protect right to stand trial). But, the Fifth Circuit failed to use their supervisory powers to correct the due process violation in petitioner's case.

The Fifth Circuit's decision in regards to petitioner's case is in direct conflict with decisions of the First and Ninth Circuits, and this Court should grant certiorari to review this case.

II. MAY A DISTRICT COURT IMPOSE CONSECUTIVE SENTENCES WITHOUT FINDING THAT A DEFENDANT POSES A DANGER TO THE COMMUNITY?

Petitioner was convicted of non-violent offenses, and consecutive sentences were imposed which amounted to 20 years imprisonment.

There was never any showing whatsoever that petitioner posed a danger to the community as he has never been charged nor convicted of a crime of violence. The present case rests strictly upon circumstantial evidence. Petitioner's only prior conviction was in the State of Colorado in 1953 where he was convicted of grand larceny, but later received a Governor's Pardon in regards to this conviction.

The Fifth Circuit stated in petitioner's case "[t]his court . . . has never held that a district court must make a finding that a defendant is dangerous to the community before imposing consecutive sentences, and we decline to

adopt such a rule now." App. 4a-5a. The Eighth Circuit so ruled in the case of *United States v. Hardrich,* 707 F.2d 992, 993 n.1 (8th Cir.), *cert. denied,* 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983), wherein the Eighth Circuit expressed grave concern about imposing consecutive sentences on non-dangerous offenders.

The Report on Corrections of the National Advisory Commission on Criminal Justice Standards and Goals and the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, are opposed to consecutive sentences, except in the case of **dangerous** offenders. The Report of the National Advisory Commission recommends a presumption in favor of concurrent sentences for multiple offenses. NAC, *Corrections* 5.6.

The ABA Standards Relating to Sentencing Alternatives and Procedures are also generally opposed to consecutive sentences. Chapter 18, Standard 4.5 holds that "consecutive sentences should not routinely be imposed" and that "the court should be authorized to impose such a sentence only after finding that confinement for such a term is necessary in order to protect the public from further serious conduct by the defendant."

In addition to running counter to modern penological thinking, the sentences imposed by the district court are far in excess of the average sentence imposed on defendants convicted of similar crimes. In 1984 (the most recent year for which statistics are available), 133 defendants were convicted of wire fraud offenses. Of this total, 54 (41%) were sentenced to probation, 20 (15%) received split sentences, and 59 (44%) were sentenced to confinement, and only six (6) defendants were sentenced to terms in excess of 60 months, and in no instance did any

defendant receive a sentence of 240 months. *See* Administrative Office of the United States Courts, *Sentence Imposed Chart Twelve Months Period Ended June 30, 1984,* at 147-148.

This Court, the lower courts, legal commentators and psychiatrists all recognize that it is exceedingly difficult to predict dangerousness. *See Addington v. Texas,* 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1979); *Hollis v. Smith,* 571 F.2d 685, 695 (2d Cir. 1978); ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 40 (1979). *See also* American Psychiatric Association, *Task Force Report on the Clinical Aspects of Violent Individuals* 28 (1974); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals,* 27 Arch. General Psychiatry 397 (1972) (*cited in United States v. Edwards,* 430 A.2d 1321, 1370 n.17 (D.C. App. 1981) (en banc) (Mack, J., dissenting), *cert. denied,* 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 141 (1982)). *United States v. Schell,* 692 F.2d 672, 683 (10th Cir. 1982). The district court never found that petitioner was dangerous nor did it find that petitioner posed a danger to the community, but still it sentenced petitioner to consecutive terms totaling 20 years. Under the circumstances of petitioner's case, it was an abuse of discretion on the part of the trial court to sentence petitioner to consecutive sentences without finding that petitioner posed a danger or threat to the community.

Under the Sentencing Reform Act of 1984 (18 U.S.C. § 3551), it was the intent of Congress that:

> "Declared, that it is the sense of the Senate that in the two years preceding the enactment of the sentencing guidelines, Federal judges, in determining the particular sentence to be imposed, consider—

"(1) the nature and circumstances of the offense and history and characteristics of the defendant;

"(2) the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense; and

"(3) the general appropriateness of imposing a sentence of imprisonment in cases in which the defendant has been convicted of a crime of violence or otherwise serious offense."

Section 239 of Pub. L. 98-473, Title II, c. II, October 12, 1984, 98 Stat. 2039.

Thus there is a direct conflict in the circuits on the issue of imposing consecutive sentences without the trial court finding that the defendant poses a danger or threat to the community.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK L. DICKIE
Petitioner pro se

DATED: 1 December 1986
El Reno, Oklahoma

CERTIFICATE OF MAILING

The undersigned hereby certifies that three (3) copies of the foregoing PETITION FOR WRIT OF CERTIORARI were sent by United States mail, postage prepaid, on this 2nd day of February, 1987, properly addressed to:

Solicitor General
United States Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530.

JACK L. DICKIE

Petitioner pro se

(October 8, 1986)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2207
Summary Calendar

(D.C. Docket No. SA-CR-84-106(1))
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK L. DICKIE,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Jack L. Dickie appeals the district court's denial of his motion for reduction of sentence under Federal Rule of Criminal Procedure-35(b). For the reasons that follow, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

In 1979, Dickie and two other men, Roberto Garcia and Mike Hernandez, attempted to defraud Larry Burnett and Brandt Starrett of $200,000 by offering to "launder" money for them and then arranging for their arrest in Mexico in possession of illegally exported firearms and explosives. Burnett and Starrett fled Mexico before being captured, and Dickie's plot was discovered.

Dickie was indicted on five counts of wire fraud in violation of 18 U.S.C. § 1343, one count of conspiring to export defense articles illegally in violation of 18 U.S.C. § 371, 22 U.S.C. § 2778, and 18 U.S.C. § 924(b), one count of illegally exporting defense articles without a license in violation of 18 U.S.C. § 2778, and one count of illegal possession of a firearm that did not have serial numbers in violation of 26 U.S.C. § 5861(i). The defendants' first trial resulted in a hung jury, and a mistrial was declared. After the first trial, codefendant Hernandez accepted a plea bargain whereby he was allowed to plead guilty to three misdemeanor offenses. Dickie was offered a plea bargain, but chose to stand trial instead. Dickie was convicted on all counts.

At the sentencing hearing, the court considered a pre-sentence report prepared by the United States Probation Office. Dickie was given an opportunity to object to the contents of the pre-sentence report. Dickie was sentenced to five years imprisonment on each of the wire fraud counts, four of them to be served consecutively, and concurrent terms of five years on the conspiracy charge and two years on the exporting charge, for a total of twenty years imprisonment. Dickie was also assessed fines totaling $115,000. In imposing the sentence, the district court noted the seriousness of the offense of smug-

gling firearms and explosives into Mexico, because such weapons could be used to promote terrorism and revolution, the effect of which could be devastating to relations between the United States and Mexico. Dickie's conviction was affirmed on direct appeal to this court. *United States v. Dickie,* 775 F.2d 607 (5th Cir. 1985).

II.

A.

The standard of review of a district court's denial of a Rule 35(b) motion for reduction of sentence is well settled in this circuit. A denial of a Rule 35(b) motion will be reversed only for illegality or gross abuse of discretion. *United States v. Castillo-Roman,* 774 F.2d 1280, 1283 (5th Cir. 1985); *United States v. Lauga,* 762 F.2d 1288, 1291 (5th Cir.), *cert. denied,* ..... U.S. ....., 106 S. Ct. 173 (1985); *United States v. Hanyard,* 762 F.2d 1226, 1228 (5th Cir. 1985); *United States v. Tooker,* 747 F.2d 975, 978 n.4 (5th Cir. 1984), *cert. denied,* ..... U.S. ....., 105 S. Ct. 2032 (1985); *United States v. Lewis,* 743 F.2d 1127, 1129 (5th Cir. 1984). In his brief, Dickie does not argue that his sentence is illegal, as indeed he cannot, since it is clear that his sentence, although severe, is within the statutory maximum for the offenses for which he was convicted. Instead, Dickie argues that the district court abused its discretion in denying his Rule 35(b) motion and denied him due process of law by penalizing him for his exercise of his constitutional right to a jury trial. We turn to a consideration of these arguments.

B.

Dickie argues that the district court abused its discretion by imposing consecutive sentences on him. His

argument is essentially two-fold. First, Dickie argues that it was an abuse of discretion for the district court to impose consecutive sentences upon him without making a finding that he was a danger to the community. Second, Dickie argues that the district court abused its discretion by imposing consecutive sentences on separate wire fraud counts that involved only one scheme to defraud. Dickie's second argument is not properly before this court because it was not raised in Dickie's Rule 35(b) motion to the district court, and therefore cannot be raised for the first time on appeal. *See Self v. Blackburn,* 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Jackson,* 700 F.2d 181, 190 (5th Cir.), *cert. denied,* 464 U.S. 842 (1983). Because we find that only the first of these contentions is properly before this court, we address only that argument.[1]

In support of his argument that it constituted an abuse of discretion for the district court to impose consecutive sentences absent a finding of dangerousness, Dickie relies upon dicta in an Eighth Circuit opinion in which that court expressed concern about the imposition of consecutive sentences for non-dangerous offenders. *See United States v. Hardrich,* 707 F.2d 992, 993 n.1 (8th Cir.), *cert. denied,* ..... U.S. ....., 104 S. Ct. 481 (1983). This court, however, has never held that a district court must make a finding that a defendant is dangerous to the community before imposing consecutive sentences, and we de-

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1. We do note, however, that this court has never held that the imposition of consecutive sentences for separate counts arising out of a single scheme to defraud constitutes an abuse of discretion. *See, e.g., United States v. Saxton,* 691 F.2d 712, 714 (5th Cir. 1982) (consecutive two-year prison terms on nine counts of mail fraud upheld over defendant's argument that all counts involved the same scheme); *see also United States v. Nichols,* 695 F.2d 86, 93-94 (5th Cir. 1982) (eight consecutive five-year terms for mail fraud arising out of the same scheme not a gross abuse of discretion).

cline to adopt such a rule now. In any case, given the seriousness of the offenses of which Dickie was convicted and the expressed concerns of the district court that Dickie's crimes could have promoted international terrorism, there was ample evidence for the district court to have concluded that Dickie presented a real danger to society. We hold that Dickie has failed to carry his burden of showing that the imposition of consecutive sentences constituted an abuse of the district court's discretion. *See Tooker*, 747 F.2d at 979-80.

C.

Dickie also argues that the district court abused its discretion and violated due process by imposing a more severe sentence on Dickie, who rejected the offer of a plea bargain and elected to go to trial, than on Dickie's codefendant, Mike Hernandez, who accepted a plea bargain.[2] These contentions are without merit. "[A] mere disparity of sentences among codefendants does not, alone, constitute an abuse of discretion." *Castillo-Roman*, 774 F.2d at 1280. "A district judge enjoys broad discretion in imposing sentence; the sentence of a codefendant need not be considered." *Garcia*, 693 F.2d at 417; *see also Lauga*, 762 F.2d at 1291. Dickie, recognizing this, also argues that the district court denied him due process of law by improperly penalizing him with a heavier sentence for exercising his constitutional right to stand trial. We also find this contention to be without merit. The problem with Dickie's

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2. Mike Hernandez pled guilty to 18 U.S.C. §§ 371 (conspiracy), 837 (blackmail), 1512(b) (tampering with witness, victim, or informant), and 31 U.S.C. §§ 5316 (reporting on exporting money) and 5322 (violation of reporting requirements on exporting currency). The district court sentenced Hernandez to three consecutive one-year sentences and imposed an $18,000 fine, the maximum penalties for these offenses.

due process argument is that it lacks a factual basis. Dickie was convicted on seven felony counts while Hernandez pled guilty to three misdemeaneors. Since Dickie and Hernandez were sentenced for different offenses under different statutes, albeit arising out of the same criminal acts, a comparison of their sentences is not possible and the disparity in their sentences will not support a claim of judicial vindictiveness. Since Dickie rejected the plea bargain accepted by Hernandez, and since Dickie and Hernandez were therefore convicted of and sentenced for different offenses, we hold that Dickie has failed to make even a threshold showing that the district court vindictively sentenced him because he exercised his constitutional right to trial by jury.

III.

For the above reasons, the district court's denial of Dickie's motion to reduce sentence is AFFIRMED.

(Filed March 10, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Cause No. SA-84-CR-106(1)

UNITED STATES OF AMERICA,
Plaintiff,

v.

JACK L. DICKIE,
Defendant.

ORDER

ON THIS DATE came on to be considered the motion of Defendant, Jack L. Dickie, to reduce sentence in the above-styled and numbered cause pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

The Court has considered said motion, the entire file in this case, and the original pre-sentence report, and it appears that the sentence imposed in this cause was fair and just, and that the motion to reduce sentence should be denied. The Court, however, will address two arguments raised by the Defendant because of the nature of Defendant's allegations. In argument "H," Defendant Dickie argues that his due process rights have been violated because his Co-Defendant Mike Hernandez, Jr. allegedly received a much lighter sentence because he pled guilty and did not exercise his right to a trial by jury.

The cases cited by the Defendant in support of his due process argument are inapposite; in the instant cause, Defendant Hernandez was never tried on the original indictment in Cause No. SA-84-CR-106, but rather pled guilty to a superseding information charging a violation of three misdemeanors. The Court imposed the maximum penalties available pursuant to the superseding information and the plea bargain agreement against Defendant Hernandez. Defendant Dickie, on the other hand, received less than the maximum allowable penalty pursuant to his conviction on the original indictment after trial of this case.

The Court has very little discretion in interfering with the Government prosecutor's discretion to bring whatever charges he believes are appropriate given the unique facts and circumstances of any particular case. *See* Comment, *Two Models of Prosecutorial Vindictiveness,* 17 Ga.L.Rev. 467 (1983); *see also United States v. Chagra,* 669 F.2d 241 (5th Cir. 1982). The only discretion the Court is granted is a rejection of the plea bargain agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure. Defendant Dickie's contention that his due process rights were violated by the Court at the time of sentencing because the Court allowed Co-Defendant Mike Hernandez, Jr. to plead guilty to a superseding information brought by the Government is accordingly without merit, and the circumstances of this case clearly show that this Court did not vindictively penalize Defendant Dickie for exercising his right to trial.

The second allegation the Court addresses is the contention that this Court sentenced on the basis of false premises relating to three alleged murders-for-hire. *See Defendant's Motion for Reduction of Sentence* at 15-17.

This argument is also without merit, as the Court stated at the time of sentencing that the three alleged murders-for-hire were in no way relied upon by the Court in passing sentence, and further, the Court ordered that any reference thereto be stricken from the pre-sentence report. While the Defendant correctly notes that a "defendant retains the right not to be sentenced on the basis of invalid premises . . . *United States v. Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973)," *Defendant's Motion* at 17, the record is clear in this case that the Court did not take any such invalid premises into account in determining Defendant's sentence. The Court accordingly rejects Defendant's argument that his sentence should be reduced because it was based in part upon invalid premises. Defendant Dickie's remaining arguments are similarly without merit. Therefore,

IT IS HEREBY ORDERED that the Defendant's motion to reduce sentence filed in the above-styled and numbered cause be DENIED in all respects.

SIGNED and ENTERED this 10th day of March, 1986, at 1:45 p.m.

/s/ William S. Sessions
William S. Sessions
Chief Judge